Supreme Court, U.S.
FILED
MAR 3 1998
CLERK

(6)

No. 97-569

In the Supreme Court of the United States
OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC.,
Petitioner,

v.

KIMBERLY B. ELLERTH,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER BURLINGTON INDUSTRIES, INC.

ROBERT A. WICKER
Vice President and
General Counsel
BURLINGTON INDUSTRIES, INC.
3330 West Friendly Avenue
Greensboro, NC 27420

JAMES J. CASEY
Counsel of Record
MARY MARGARET MOORE
ROSS & HARDIES
150 N. Michigan Avenue
Suite 2500
Chicago, IL 60601
(312) 558-1000

Counsel for Petitioner
Burlington Industries, Inc.

46 pp

QUESTION PRESENTED

Whether a claim of *quid pro quo* sexual harassment may be stated under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions or privileges of employment as a consequence of a refusal to submit to those advances.

LIST OF PARTIES

The proceeding in the United States Court of Appeals for the Seventh Circuit, whose judgment is sought to be reviewed, consisted of two proceedings, Nos. 95-3128 and 96-1361, which were consolidated by the Court of Appeals for purposes of decision.

The following persons and entities are now before the Court and were parties to the proceedings indicated:

Petitioner: Burlington Industries, Inc.* (No. 96-1361)

Respondent: Kimberly B. Ellerth (No. 96-1361)

The following persons and entities were parties to the proceedings indicated:

Alice Jansen (No. 95-3128); Packaging Corporation of America (No. 95-3128)

---

* Pursuant to Supreme Court Rule 29.1, Petitioner Burlington Industries, Inc. states that it has no parent or subsidiary corporations, other than wholly-owned subsidiaries.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

A. Underlying Facts 2

B. Proceedings In The District Court 6

C. The Decision Of The Court Of Appeals Panel 7

D. The Decision Of The En Banc Court Of Appeals 8

SUMMARY OF ARGUMENT 11

ARGUMENT 14

I. THE HARSH STRICT LIABILITY STANDARD SHOULD NOT BE APPLIED TO A SUPERVISOR'S UNFULFILLED THREATS; SUCH THREATS WERE PROPERLY ANALYZED UNDER A HOSTILE WORK ENVIRONMENT THEORY 14

A. The *Quid Pro Quo* Theory Of Sexual Harassment And Its Strict Liability Standard Has Been And Should Be Narrowly Construed To Compensate Employees Who Actually Suffer Tangible Job Detriments As A Result Of Their Refusal To Submit To A Supervisor's Sexual Demands 16

B. Slowik's Implied Threats Were Properly Analyzed By The District Court Under A Purely Hostile Work Environment Theory Where The Court Evaluated The Threats In The Context Of All Relevant Circumstances 19

II. A STRICT LIABILITY STANDARD SHOULD NOT APPLY TO A SUPERVISOR'S IMPLIED THREATS SINCE AN EMPLOYER HAS NO KNOWLEDGE OF SUCH CONDUCT AND NO WAY OF COMPLETELY ELIMINATING SUCH CONDUCT 21

A. A Strict Liability Standard Should Not Apply In Threat Only Cases Since There Is No Company Act And An Employer Will Not Have Knowledge Of Any Potential Wrongdoing 21

B. Imposing A Strict Liability Standard For Threats Would Place An Impossible Burden On Employers While At The Same Time Encroaching On Employee Privacy 24

C. If Threats Only Are Actionable Under A Strict Liability Standard, The Number Of *Quid Pro Quo* Claims Will Increase Significantly 25

III. THE SEVENTH CIRCUIT'S EXPANSION OF THE *QUID PRO QUO* DOCTRINE TO INCLUDE SLOWIK'S IMPLIED THREATS IS CONTRARY TO THIS COURT'S STRICT LIABILITY DISCUSSION CONTAINED IN *MERITOR* AND THE APPLICATION OF COMMON-LAW AGENCY PRINCIPLES 26

A. Slowik's Implied Threats Were Outside The Scope Of His Employment 27

B. Ellerth Could Not Have Reasonably Believed That Slowik Had The Apparent Authority To Make The Implied Threats She Has Alleged 29

IV. THE MAJORITY OF CIRCUIT COURTS AGREE THAT THE DOCTRINE OF *QUID PRO QUO* SEXUAL HARASSMENT DOES NOT APPLY TO UNFULFILLED THREATS 31

A. The District Of Columbia Circuit Court, The Only Other Circuit Court To Directly Address This Issue, Has Held That A Tangible Job Detriment Is Required In *Quid Pro Quo* Cases 31

B. The First, Second, Fourth, Fifth, Sixth, Eighth And Tenth Circuits Have All Defined *Quid Pro Quo* Harassment As Requiring A Tangible Job Detriment Or Submission 32

C. Only The Third And Ninth Circuits Have Defined *Quid Pro Quo* Harassment As Requiring Only A Threat, And They Have Done So In Cases Where The Definition Was Not Relevant To The Holding Of The Cases 34

CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Andrade v. Mayfair Management, Inc.,
88 F.3d 258 (4th Cir. 1996) 30

Bouton v. BMW of North America, Inc.,
29 F.3d 103 (3d Cir. 1994) 30

Bryson v. Chicago State Univ.,
96 F.3d 912 (7th Cir. 1996) 17

Carrero v. New York City Housing Authority,
890 F.2d 569 (2d Cir. 1989) 34

Chamberlin v. 101 Realty, *Inc.*,
915 F.2d 777 (1st Cir. 1990) 32

Cram v. Lamson & Sessions Co.,
49 F.3d 466 (8th Cir. 1995) 33

Ellert v. University of Texas, at Dallas,
52 F.3d 543 (5th Cir. 1995) 33

Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995),
cert. denied, 116 S.Ct. 569
(1995). 13, 29, 30, 31, 32

Greenman v. Yuba Power Prods., Inc.,
59 Cal. 2d 57, 377 P.2d 897 (1963) 24

Harris v. Forklift Sys., Inc.,
510 U.S. 17 (1993) 15

Henson v. City of Dundee,
682 F.2d 897 (11th Cir. 1982) 14, 28

Heyne v. Caruso,
69 F.3d 1475 (9th Cir. 1995) 34

Hicks v. Gates Rubber Co.,
833 F.2d 1406 (10th Cir. 1987) 33

Hunter v. Allis-Chalmers Corp., Engine Div.,
797 F.2d 1417 (7th Cir. 1986) 28

Karabian v. Columbia University,
14 F.3d 773 (2d Cir.), cert. denied,
512 U.S. 1213 (1994) 34

Kauffman v. Allied Signal, Inc.,
970 F.2d 178, 187 (6th Cir.),
cert. denied, 506 U.S. 1041 (1992) 33

Kotcher v. Rosa and Sullivan Appliance Ctr.,
Inc., 957 F.2d 59 (2d Cir. 1992) 21, 28, 34

Lipsett v. University of Puerto Rico,
864 F.2d 881 (1st Cir. 1988) 32

Meritor Savings Bank, FSB v. Vinson,
477 U.S. 57 (1986) . . . . . *passim*

Moskowitz v. Trustees of Purdue University,
5 F.3d 279 (7th Cir. 1993) 4

Nichols v. Frank,
42 F.3d 503 (9th Cir. 1994) 34

Robinson v. City of Pittsburgh,
120 F.3d 1286 (3d Cir. 1997) 34

Sauers v. Salt Lake County,
1 F.3d 1122 (10th Cir. 1993) 33

Saulpaugh v. Monroe Community Hosp.,
4 F.3d 134 (2d Cir. 1993),
cert. denied, 510 U.S. 1164 (1994) 34

Smith v. Metropolitan School Dist. Perry Township.,
128 F.3d 1014 (7th Cir. 1997) 30

Sparks v. Pilot Freight Carriers, Inc.,
830 F.2d 1554 (11th Cir. 1987) 33

Spencer v. General Electric Co.,
894 F.2d 651 (4th Cir. 1990) 32

Steele v. Offshore Shipbuilding,
867 F.2d 1311 (11th Cir. 1989) 21, 28

STATUTE

42 U.S.C. § 2000e-2(a)(1) 1

MISCELLANEOUS

Restatement (Second) of Agency
§ 219(1) 27
§ 219(2)(d) 29

§ 228(1) 28

Restatement (Second) of Torts §§ 519 & 520 24

Stacey Dansky, *Eliminating Strict Employer Liability In Quid Pro Quo Sexual Harassment*, 76 Tex. L. Rev. 435, 439 (1997) 18

Rachel E. Lutner, *Employer Liability For Sexual Harassment: The Morass Of Agency Principles And Respondeat Superior*, 3 Univ. Ill. L. Rev. 589 (1993) 18

Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look At Meritor Savings Bank, FSB v. Vinson*, 44 Vand. L. Rev. 1229 (1991) 18

J. Hoult Verkerke, *Notice Liability In Employment Discrimination Law*, 81 Va. L. Rev. 273 (1995) 18, 23

OPINIONS BELOW

The en banc opinion of the court of appeals, Pet. App. 1a-208a, is reported at 123 F.3d 490. The panel opinion of the court of appeals, Pet. App. 209a-241a, is reported at 102 F.3d 848. The opinion of the district court, Pet. App. 241a-287a, is reported at 912 F. Supp. 1101.

JURISDICTION

This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case concerns Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 253, 255, which provides:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1).

STATEMENT OF THE CASE

A. Underlying Facts[1]

Kimberly Ellerth resigned from Burlington Industries in May 1994, informing Burlington that she had taken a new job. Since resigning, Ellerth has claimed that, during her fifteen months of employment with Burlington, she was sexually harassed by Theodore Slowik, a vice president of one of Burlington's divisions. Ellerth, who admitted that she was aware of Burlington's policy prohibiting sexual harassment during her employment, and admitted that she had received and read Burlington's employee handbook which contained this policy, as well as Burlington's grievance procedures, chose not to complain to her supervisors or anyone in the human resources department about the alleged harassment until after she quit her job. J.A. 10-14, 109-112, Pet. App. 271a-272a.

Burlington is a manufacturer of textiles and home furnishings which employs over 22,000 people and operates more than 50 plants and offices around the United States. J.A. 117. Burlington hired Ellerth in March of 1993 as a merchandising assistant in the Chicago office after she interviewed with Mary Strenk Fitzgerald, a National Accounts Manager in Burlington's Mattress Fabric (or "Ticking") Division, and Slowik, who holds the position of Vice-President of Sales and Marketing for Burlington's House Mattress Ticking Division and who works out of Burlington's New York office. J.A. 118-120. Approximately one week after her

[1] These facts are taken from Burlington's motion for summary judgment. While Burlington contests Ellerth's allegations of sexual harassment, for purposes of the summary judgment and appeal they have been considered as true.

interview with Slowik, Fitzgerald called Ellerth to offer her the position, which Ellerth accepted. J.A. 120.

As a merchandising assistant, Ellerth assisted Fitzgerald in her day-to-day activities and travelled occasionally, usually for training-related purposes. J.A. 120. Fitzgerald reported directly to Slowik. J.A. 120. Ellerth also spoke with Slowik on the telephone approximately once a week, and can recall seeing Slowik on only eight different occasions during her fifteen months at Burlington. J.A. 120, Pet. App. 242a - 249a.

In March 1994, approximately one year after she was hired, Ellerth was promoted to the position of sales representative following interviews with Patrick Lawrence and Slowik. J.A. 121. Lawrence became Ellerth's immediate supervisor, and Lawrence reported to Slowik. J.A. 121. Ellerth knew that Slowik recommended her for the promotion. J.A. 63-64.

Approximately two months after her promotion, Ellerth's direct supervisor, Lawrence, and Donna Thibideau, Burlington's Customer Service Manager, received some complaints from customers and other Burlington employees about Ellerth. J.A. 123-125. When they (not Slowik) discussed these complaints with Ellerth, she voluntarily resigned.[2] J.A. 87-100. Ellerth left a message on Lawrence's answering machine informing him that she was quitting, effective immediately, and also faxed him a letter to the same effect, which indicated that she had accepted another job offer.

[2] In her lawsuit, Ellerth claimed that Burlington had constructively discharged her because Slowik's alleged harassment forced her to resign. As discussed below, the district court granted summary judgment for Burlington on Ellerth's constructive discharge claim. The Seventh Circuit did not disturb this holding on appeal.

Ellerth did not mention in her telephone message or her resignation letter that she believed she had been sexually harassed by Slowik. J.A. 10-14, 99.

Ellerth now alleges that Slowik asked inappropriate questions in her pre-employment interview, stared at her, told offensive jokes, complimented her physical features, touched her inappropriately twice on the knee and once on the buttocks, and used sexual innuendos in his telephone conversations with her.[3] J.A. 127-144.

Ellerth also contends that Slowik insinuated that her response to his "harassment" would affect her career at Burlington.[4] Specifically, in the summer of 1993, Ellerth accompanied Slowik to a hotel lounge while on a business trip in North Carolina. She claims that, while in the bar, Slowik told her that she ought to "loosen up," and that, upon leaving the bar, he stated, "You know, Kim, I could make your life very hard or very easy at Burlington."[5] J.A. 38-41.

---

[3] The Seventh Circuit affirmed the district court's decision granting Burlington's motion for summary judgment on Ellerth's hostile work environment claim.

[4] These "threats" are the only allegations of sexual harassment before this Court that relate to the question on which this Court granted certiorari.

[5] Burlington has successfully argued below that because of the 300-day statute of limitations for Title VII claims, any claim based on this statement was time-barred. In fact, the district court specifically held that since Ellerth was clearly aware that Slowik was engaging in sexual harassment, she could not "sit back and accumulate all the discriminating acts and sue on all within the statutory period applicable to the last one," Pet. App. 260a (quoting *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 282 (7th Cir. 1993)). Ellerth did not appeal the district court's ruling in this regard.

Ellerth also claims that, at her promotion interview in March 1994, Slowik acknowledged that he had told others that she was "arrogant" and "not loose enough" and that this gave him reservations about promoting her. She also claims that Slowik rubbed her knee, and that she pulled her leg away in response. J.A. 64-66. Nevertheless, Slowik promoted Ellerth shortly thereafter. J.A. 68-69.

Ellerth further alleges that, in May 1994, she telephoned Slowik for special permission to perform a single, minor project for a customer and that Slowik responded, "I don't have time for you right now, Kim, unless you're telling me--unless you want to tell me what you are wearing." J.A. 77-78. In a follow-up telephone call a day or two later, Slowik allegedly asked Ellerth something along the lines of, "Are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." J.A. 79.

Ellerth did not submit or otherwise respond to Slowik's statements that she perceived as sexual advances. Nor is there any evidence that Ellerth suffered any adverse employment consequence as a result of ignoring Slowik's alleged comments. On the contrary, after Ellerth refused Slowik's alleged advances in North Carolina and at her promotion interview, she received a promotion which raised her salary by $4,000, and entitled her to receive a yearly bonus. J.A. 123.

Ellerth never informed any of her supervisors or any of Burlington's human resources personnel about Slowik's alleged

harassment until after her resignation.[6] Ellerth also stated that she chose not to inform Lawrence because "it would be his duty as my supervisor to report any incident of sexual harassment." J.A. 110-111. Ellerth was aware of Burlington's policy regarding sexual harassment. J.A. 111-112. She had received and read Burlington's employee handbook containing this policy. J.A. 111-112. Yet, she chose not to inform her supervisors because she and her husband purportedly believed that reporting Slowik's harassment would put her job in jeopardy. J.A. 114-115. This purported belief, however, was not based upon any prior conduct of anyone at Burlington, nor any experience she had at Burlington. J.A. 115.

B. Proceedings In The District Court

Burlington moved for summary judgment on the grounds that, under the undisputed facts of the case, a reasonable jury could not find it liable for hostile work environment sexual harassment or constructive discharge, the only two claims articulated in Ellerth's complaint. The district court agreed. The district court granted summary judgment for Burlington on Ellerth's constructive discharge claim, reasoning that "when an employer provides an avenue for relief from sexual harassment and an employee chooses to forego that avenue, she cannot be heard to complain that she was constructively discharged by virtue of the harassment." Pet.

---

[6] Ellerth does claim that she informed certain non-supervisory co-workers about Slowik's alleged harassment, but each of these individuals denied that Ellerth ever complained of sexual harassment by Slowik. Nevertheless, Burlington assumed, for purposes of summary judgment, that Ellerth informed these individuals of the alleged harassment. Ellerth concedes, however, that she did not properly report the sexual harassment in that she did not inform her supervisors, anyone in human resources, or anyone else in authority at Burlington, about the alleged harassment. J.A. 104-113.

App. 286a - 287a. The district court also granted summary judgment on Ellerth's hostile work environment claim, holding that because Burlington lacked knowledge of Slowik's alleged harassment, it was not negligent in failing to prevent it. Pet. App. 285a. The district court did not believe that Ellerth had intended to advance a *quid pro quo* claim, but held that, in any event, "for Ellerth to prevail on a theory of *quid pro quo* harassment, she would have to prove that Slowik actually withheld tangible employment benefits as a result of her failure to submit to his sexual overtures." Pet. App. 264a. Because Ellerth had presented no such evidence, the district court disregarded *quid pro quo* as a basis for recovery.

C. The Decision Of The Court Of Appeals Panel

Ellerth appealed the district court's ruling to the Seventh Circuit. A three-judge panel of the court of appeals reversed the district court and held that Ellerth had presented sufficient evidence to proceed to the jury under either a *quid pro quo* or a hostile work environment theory. With respect to the former theory, the panel found that Slowik's comments constituted *quid pro quo* propositions which were themselves actionable, notwithstanding the fact that they did not induce Ellerth to submit to Slowik's alleged sexual advances and Slowik never followed through on his alleged implicit threats of retribution. Pet. App. 220a-221a. The panel also held that Burlington could be liable for Slowik's hostile work environment sexual harassment, despite the fact that Ellerth knew Burlington had a policy against sexual harassment and chose not to complain about the harassment until after she resigned. Burlington successfully petitioned the Seventh Circuit for rehearing en banc and the panel opinion was vacated.

D. The Decision Of The En Banc Court Of Appeals

In a per curiam decision preceding eight separate signed opinions, the Seventh Circuit, en banc, held that employers may be held strictly liable under Title VII of the Civil Rights Act of 1964 on a *quid pro quo* sexual harassment theory even if the allegedly harassed employee neither submitted to a supervisor's sexual advances nor suffered any adverse employment consequences as a result of refusing these advances.[7]

A bare majority of the judges (six of eleven) concurred in the panel's view "that liability for *quid pro quo* harassment is strict even if the supervisor's threat does not result in a company act," *i.e.*, does not result in some adverse employment consequence. Pet. App. 7a. Based on this principle, the court held Slowik's alleged *quid pro quo* propositions[8] to be a sufficient basis for Ellerth to defeat summary judgment on her *quid pro quo* claim.

Writing for a plurality of four judges, Judge Flaum held that "a clear and serious *quid pro quo* threat alters the `terms and conditions' of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled." Pet. App. 17a. Judge Flaum opined that this conclusion was consistent with principles of

---

[7] The Seventh Circuit also held that in a hostile work environment sexual harassment case, the applicable standard for judging a company's liability for a supervisor's harassing acts is negligence, not strict liability. On appeal, a clear majority of judges also found that Ellerth had waived her hostile work environment argument. Pet. App. 6a.

[8] Specifically, the panel based this finding on Slowik's alleged comment over the telephone that he did not have time for Ellerth "unless [she] want[ed] to tell [him] what [she was] wearing." Pet. App. 221a.

agency law which hold a principal liable for its agent's exercise of delegated authority and with the intent of the 1991 amendments to the Civil Rights Act which provide compensation for emotional damage. Pet. App. 17a-18a.

Five of the eleven judges, namely Chief Judge Posner, Judges Kanne, Manion, Easterbrook and Coffey, each submitted separate concurring and dissenting opinions in which they rejected Judge Flaum's view that a supervisor's unfulfilled threats amounted to *quid pro quo* sexual harassment.[9]

Chief Judge Posner reasoned that the strict liability standard should apply only to "company acts," which he defined as "an act that significantly alters the terms or conditions of employment of the victim of sexual harassment." Pet. App. 54a. It is only these acts, Chief Judge Posner stated, which are within an employer's reasonable ability to monitor and control. Pet. App. 51a. It would be inappropriate to apply standards of strict liability to "non-company acts" such as unfulfilled threats of job retaliation because this conduct is "outside the channels in which action by supervisors is realistically controllable by their superiors." Pet. App. 53a. Chief Judge Posner noted that other circuits have adopted this approach to sexual harassment claims. Pet. App. 52a.

In his opinion, Judge Coffey wrote that *quid pro quo* harassment, by its very definition, requires "something for something," that is, an exchange linking an economic benefit to participation in sexual conduct. Pet. App. 95a. Thus, a plaintiff claiming *quid pro quo* sexual harassment must allege

---

[9] While Judge Easterbrook wrote that Ellerth's claim should only be analyzed as a hostile work environment claim, he joined in Judge Wood's conclusion that Burlington should be strictly liable for Slowik's hostile work environment harassment.

that she suffered a materially adverse employment action due to the harassment. Pet. App. 95a. Judge Coffey also noted that none of the cases relied upon by Judge Flaum in advancing his "attempted quid pro quo harassment" doctrine involved merely unfulfilled threats of retaliation. Rather, in each of those cases, the employee either submitted to the supervisor's advances or suffered tangible consequences for refusing to do so. Pet. App. 100a-101a.

Judge Kanne also wrote that an employer should not be strictly liable for mere threats made by a supervisory employee. Agreeing that the focus should be on deterrence, Judge Kanne stated that a negligence standard would suffice because "employers will rationally seek to avoid liability 1) by establishing policies and procedures to circumscribe improper conduct by supervisors, and 2) by imposing appropriate sanctions against errant supervisors once notified by an employee that a supervisor has made a quid pro quo threat." Judge Kanne also cautioned that because *quid pro quo* threats can be ambiguous, if such threats make an employer strictly liable, "plaintiffs will attempt to turn all instances of supervisor sexual harassment into 'implied threats' in order to take advantage of strict liability's easier burden of proof." Pet. App. 33a.

Judge Easterbrook also believed that Ellerth's claims should be analyzed only under a hostile work environment theory, reasoning that, since Slowik's implications that he would hinder Ellerth's advancement if she did not provide sexual favors were never carried through, and Ellerth never submitted to his unlawful demands, Slowik's attempts failed, leaving only the unpleasant working environment. Pet. App. 151a-152a.

Judge Manion, agreeing that "a threat without negative job consequences cannot support a quid pro quo claim," reasoned that "absent a complaint by the employee, the company is in the dark" and the imposition of strict liability is clearly unjust. Pet. App. 160a. Judge Manion further explained that threats cannot constitute *quid pro quo* harassment for the same reason they could not fall within the supervisor's scope of employment -- they are not authorized, they do not carry the employer's imprimatur and they do not speak on behalf of the company. Pet. App. 161a.

SUMMARY OF ARGUMENT

Expanding the scope of employer strict liability to situations where, as here, a supervisor makes an empty threat that does not result in any job detriment or submission by the employee would be an unwarranted expansion of Title VII liability. According to the Seventh Circuit's ruling, Burlington's liability attached the second Slowik uttered an implied threat, regardless of Burlington's lack of knowledge of the conduct, or the steps Burlington successfully took to notify Ellerth that such conduct would not be tolerated, and regardless of how the implied threat was perceived by Ellerth.

Congress simply cannot have intended for Title VII to make employers strictly liable for the behavior of their supervisory employees at all times and all places. Congress likewise cannot have intended for employers to be strictly liable for actions of which they have no notice and no reasonable means of acquiring notice, and which cannot reasonably be imputed to them under agency principles.

Thus, there must be some limits to the definition of *quid pro quo* sexual harassment and limits on what conduct is entitled to be held to a strict liability standard. This standard

should not apply to the "threatened *quid pro quo*" which the Seventh Circuit recognized in the instant case.

Instead, an employee alleging a *quid pro quo* sexual harassment claim for which a company may be strictly liable must establish that she has suffered a tangible job detriment as a result of her refusal to submit to sexual demands. If, as the facts in the instant case demonstrate, the employee rebuffs her supervisor's advances, and suffers no tangible job detriment, the company should not be strictly liable for the supervisor's empty threat. Rather than imposing the harsh strict liability standard the Seventh Circuit has mandated, the district court properly analyzed Slowik's alleged "threats" under a hostile work environment theory and considered the undisputed facts that Ellerth was aware of Burlington's sexual harassment policy and complaint procedure, knew that Slowik's "threats" violated Burlington's sexual harassment policy, and still consciously chose not to complain about the threats until after she resigned from her employment at Burlington.

A strict liability standard is inappropriate in addressing unfulfilled threats since there has been no action on the part of the employer (*i.e.*, there has been no termination, demotion, etc.) and employers have no effective means of monitoring the "non-company acts" of their supervisors. Broadening the scope of *quid pro quo* harassment to include mere threats would also place more sexual harassment claims under the umbrella of strict liability, as opposed to the negligence standard generally applicable to hostile work environment sexual harassment claims.

Application of a strict liability standard to the threats made by Slowik is also contrary to this Court's admonition in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), that companies are not to be held absolutely liable for all forms of

sexual harassment and that courts should be guided by the common-law principles of agency. Under those principles, Burlington cannot be held liable for Slowik's alleged threats since it is clear that he was not acting within the scope of his employment when he made the threats (*i.e*, sexual harassment is not within the scope of employment), and since it is clear that Ellerth knew he did not have "authority" to engage in such conduct, based on her admitted knowledge of Burlington's sexual harassment policy.

The D.C. Circuit, the only other Circuit to directly address the issue of threat only *quid pro quo* harassment, has properly held that threats alone do not amount to *quid pro quo* harassment in the absence of tangible effects on employment. *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 569 (1995). The court declared, "it takes more than saber-rattling alone to impose *quid pro quo* liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." 59 F.3d at 1396. Most circuit courts have agreed with this analysis. *See infra* pp. 31-35.

The approach adopted by the D.C. Circuit, and a majority of the circuits, to *quid pro quo* sexual harassment is more sound and better balances the interests of employees and employers than does the Seventh Circuit's approach. This is demonstrated by the facts of the instant case. Title VII's goals would be best served if Ellerth were required to complain about the alleged threats, thus providing Burlington with an opportunity to investigate and remedy any improper conduct. Under a strict liability standard where Ellerth has no incentive to report the conduct, Burlington could only have known about the alleged threats if it had monitored Slowik's every move.

ARGUMENT

Strict liability under Title VII should be reserved to remedy only a narrow set of egregious circumstances where an employee actually suffers a tangible job detriment as a result of her refusal to submit to a supervisor's unlawful sexual advances. In the absence of a tangible job detriment, any implied threats, or ambiguous statements perceived as such, are concealed from the employer. In the instant case, Ellerth suffered no tangible job detriment as a result of her refusal to submit to Slowik's purported threats, and Burlington had no way of learning of the implied threats except through Ellerth who chose not to complain about them. Burlington should, therefore, be held to a negligence, not strict liability, standard in evaluating Slowik's conduct.

I. THE HARSH STRICT LIABILITY STANDARD SHOULD NOT BE APPLIED TO A SUPERVISOR'S UNFULFILLED THREATS; SUCH THREATS WERE PROPERLY ANALYZED UNDER A HOSTILE WORK ENVIRONMENT THEORY

Courts began to recognize sexual harassment claims during the late 1970's after gender-based discrimination was included in Title VII of the Civil Rights Act of 1964. Soon thereafter, courts developed the now well-known and generally accepted distinction between *quid pro quo* and hostile work environment harassment.[10] Classification of a sexual

---

[10] In 1982, the Eleventh Circuit, in *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), outlined the prima facie elements of a *quid pro quo* claim under Title VII and lower courts have, for the most part, consistently followed that court's guidance. In *Henson*, the court stated that, in order to establish a *quid pro quo* claim, an employee must (continued...)

harassment claim as either *quid pro quo* or hostile work environment determines the standard of employer liability, *i.e.*, companies are strictly liable for *quid pro quo* claims where they have caused a tangible detriment to the employee but liable only under a negligence standard for hostile work environment harassment.

Although sexual harassment has consistently been analyzed by courts in terms of either *quid pro quo* or hostile work environment harassment, this Court has never explicitly approved this distinction. Neither *Meritor*, 477 U.S. 57, nor *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), the only two

---

[10](...continued)
demonstrate that:

> (1) The employee belongs to a protected group.
> (2)The employee was subject to unwelcome sexual harassment.
> (3) The harassment complained of was based upon sex.
> (4) The employee's reaction to harassment complained of affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment. The acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment in order to create liability under this theory of sexual harassment. **As in the typical disparate treatment case, the employee must prove that she was deprived of a job benefit which she was otherwise qualified to receive because of the employer's use of a prohibited criterion in making the employment decision.**
> (5) Respondeat superior.

Id. at 909 (emphasis added).

sexual harassment cases previously decided by this Court, involved a *quid pro quo* claim.[11]

A. The *Quid Pro Quo* Theory Of Sexual Harassment And Its Strict Liability Standard Has Been And Should Be Narrowly Construed To Compensate Employees Who Actually Suffer Tangible Job Detriments As A Result Of Their Refusal To Submit To A Supervisor's Sexual Demands

Quid pro quo harassment occurs in a narrow and specific set of circumstances where a supervisor demands sexual favors from an employee and the employee either submits to the demand or suffers a tangible job detriment for failing to submit.[12] In a non-submission case, the discrimination occurs when the supervisor makes an employment decision that adversely affects the employee based

---

[11] Although *Meritor* was not a *quid pro quo* harassment case, this Court contrasted hostile work environment sexual harassment with *quid pro quo* harassment by stating that a hostile work environment may be proven whether or not the harassment is "directly linked to the grant or denial of an economic quid pro quo." *Id.* at 65 (emphasis added). The word "economic" before *quid pro quo* clearly implies that the Court recognized that an economic job detriment or benefit typically exists in a *quid pro quo* case, and that such an element distinguishes it from a hostile work environment claim.

[12] A tangible job detriment, however, is not required in suits alleging hostile work environment sexual harassment. In such cases, the harassment victim typically is subjected to unwelcome sex-related behavior that has the purpose or effect of unreasonably interfering with her work performance or of creating an intimidating, hostile, or offensive working environment. For such conduct to be actionable, it must be sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive working environment.

on an illegal reason, *i.e.*, the failure of the employee to submit to his sexual demands.[13] Without an act by the supervisor, there has been no *quid pro quo* harassment. As a result, there should be no strict liability.

In the classic *quid pro quo* case, a supervisor threatens to terminate an employee if she refuses to engage in sexual relations with him. When the employee refuses and is terminated, she can assert a *quid pro quo* claim against her employer, who, if the employee is successful in proving her claim, will be strictly liable for the supervisor's actions. The strict liability standard and resulting remedy are aimed at addressing the discrimination the employee has suffered. The utterance of words, which are only "threats" to discriminate, is not enough for such a claim.[14]

---

[13] While courts have utilized the concept of *quid pro quo* harassment largely to rectify the economic loss suffered by victims of such harassment and this Court in *Meritor* characterized *quid pro quo* as "economic quid pro quo," (*see* n. 11 *infra*), it is well-settled that a tangible job detriment need not be economic in nature as long as it is tangible and material. *See, e.g., Bryson v. Chicago State Univ.*, 96 F.3d 912 (7th Cir. 1996)(the loss of a job title and banishment from committee work were considered tangible job detriments).

[14] This rationale is consistent with other aspects of Title VII law where, for example, a company is liable when a supervisor fires a black employee because of his race. Such an act is a company act and the company is liable for the tangible job detriment suffered by the employee who is fired because of his race. If an employee suffers no tangible job detriment, as in the case of a threat only, an employer is not liable under Title VII because there has been no act by the company. In the instant example, if a supervisor merely threatens to fire a black employee because of his race, but does not do so, the company is not automatically liable because the employee has suffered no tangible job detriment.

As Professor J. Hoult Verkerke of the University of Virginia School of Law explained, a *quid pro quo* claim:

> requires that the victim either actually refuse the advances and suffer a tangible job detriment or submit and retain a tangible job benefit. Quid pro quo theory appears not to encompass cases in which the supervisor threatens a job detriment but fails to carry through on his threat after the victim refuses to submit. **There is no doctrine of attempted quid pro quo; such unwelcome sexual advances could only be challenged under the hostile work environment theory.**

J. Hoult Verkerke, *Notice Liability In Employment Discrimination Law*, 81 Va. L. Rev. 273, 280 n. 15 (1995)(emphasis added). *See also*, Rachel E. Lutner, *Employer Liability For Sexual Harassment: The Morass Of Agency Principles And Respondeat Superior*, 3 Univ. Ill. L. Rev. 589, 611 (1993)("[t]he quid pro quo claim is limited by its definition of 'tangible job detriment'"); Stacey Dansky, *Eliminating Strict Employer Liability In Quid Pro Quo Sexual Harassment*, 76 Tex. L. Rev. 435, 439 (1997)("[q]uid pro quo sexual harassment technically differs from hostile environment sexual harassment in that in the quid pro quo context, the supervisor directly manipulates the actual terms or conditions of employment, in the hostile environment context, the supervisor constructively alters the employment conditions by engaging in sufficiently severe and pervasive harassing conduct"); and Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look At Meritor Savings Bank, FSB v. Vinson*, 44 Vand. L. Rev. 1229 (1991)("courts generally agree that the employee must have suffered some tangible job detriment to pursue a quid pro quo claim.")

B. Slowik's Implied Threats Were Properly Analyzed By The District Court Under A Purely Hostile Work Environment Theory Where The Court Evaluated The Threats In The Context Of All Relevant Circumstances

Slowik's statements were properly analyzed by the district court under a hostile work environment theory where the proper standard of liability is negligence and the court could account for all the circumstances of the case.[15] Imposing a higher standard of strict liability would preclude such an analysis and thwart the purposes of Title VII. The facts of this case are a perfect illustration of how Title VII could be abused by employees if employers were held absolutely liable for threats only, without even any inquiry into the severity of the threats, or the reasonableness of the employee's belief that the threats could be carried out.

Ellerth claims that, at her promotion interview, she was threatened with Slowik's vague statement that he had hesitations about promoting her because she was "arrogant" and not "loose enough." Despite this alleged threat and Ellerth's failure to submit to what she perceived to be Slowik's advances, Ellerth was in fact promoted shortly after the interview, and Ellerth has acknowledged that she knew that Slowik recommended her promotion.

---

[15] In *Meritor*, this Court held that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." *Id.* at 67. Under a hostile work environment negligence standard, an employer's culpability for supervisory sexual harassment can be assessed in the context of all relevant circumstances.

The district court's analysis in this case also considered the fact that Ellerth knew that Slowik's statements were improper and against company policy and that Slowik was clearly not acting with the company's imprimatur when he made the threats. Burlington had in place a policy prohibiting sexual harassment which effectively divested Slowik of any authority to conduct the harassment or issue the threats. This policy, which described avenues of recourse for those who believed they had been harassed, was known by Ellerth. Under a hostile work environment theory, this evidence is relevant to establish whether Burlington is liable and, in fact, was determinative in deciding that Burlington was not liable for hostile work environment harassment in this case.

Since Ellerth knew that Slowik's statements were in direct contravention of Burlington's sexual harassment policy, and since Ellerth was promoted even though she did not submit to Slowik's alleged sexual advances, Ellerth could not have reasonably believed that Slowik's two future "threats", (*i.e.*, Slowik's request that Ellerth tell him what she was wearing, and his statement to her that if she were wearing shorter skirts it would make her job easier) would result in a tangible job detriment if she did not engage in the requested conduct.

If Burlington were held to a strict liability standard in this case, Ellerth would be entitled to recover for Slowik's implied threats, despite 1) Ellerth's knowledge that such threats were strictly prohibited by Burlington's sexual harassment policy, 2) Ellerth's knowledge that such threats could not be legally carried out by Slowik, 3) Ellerth's knowledge of Burlington's complaint procedure and failure to utilize it, 4) Ellerth's admission that, had she complained about the threats to her immediate supervisor, it would have been his duty to report the conduct, and 5) Ellerth's understanding that Slowik had previously impliedly threatened her promotion and failed

to follow through on what she perceived to be a threat. Such an outcome in this case would be unjust and would not promote the remediation and deterrence policies promoted by Title VII. Rather, it would send a message to employers that, regardless of the vigilant measures they may take to inform employees of their preventative policies prohibiting sexual harassment and their grievance procedures, they may still be held strictly liable under the circumstances presented in this case.

II. A STRICT LIABILITY STANDARD SHOULD NOT APPLY TO A SUPERVISOR'S IMPLIED THREATS SINCE AN EMPLOYER HAS NO KNOWLEDGE OF SUCH CONDUCT AND NO WAY OF COMPLETELY ELIMINATING SUCH CONDUCT

A. A Strict Liability Standard Should Not Apply In Threat Only Cases Since There Is No Company Act And An Employer Will Not Have Knowledge Of Any Potential Wrongdoing

The rationale for applying a strict liability standard to *quid pro quo* harassment is that, under agency principles, when a supervisor implements an employment benefit or detriment based upon an employee's receptiveness to sexual advances, the supervisor is using the authority delegated by the employer and therefore acts as the employer. Pet. App. 12a; *see also Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989). In such circumstances, the employer knows or should know of the decision because, to borrow Chief Judge Posner's terminology, the supervisor has engaged in a "company act." Pet. App. 51a. In other words, there has been a job decision in which the supervisor is

actually exercising delegated authority. An employer would have the opportunity to weed out *quid pro quo* harassment through aggressive scrutiny of promotions, demotions, performance reviews and the like for retaliatory or other impermissible motives.

The same is not true when a supervisor suggests that job benefits are limited to an employee's response to his sexual advances, but then fails to act upon these suggestions. Here, the supervisor has not actually used any authority delegated by the employer; at most, he has only contemplated doing so. Because employers cannot monitor every interaction between supervisors and their subordinates, they cannot be aware of such a "threat" because no actual job action has occurred which would trigger review by the employer. Imposing strict liability in such circumstances would create a draconian burden on employers who are already taking extensive measures to combat harassment.

A situation involving unfulfilled threats is most analogous to that of sexual harassment which creates a hostile work environment in that the employer has not granted or withheld an employment benefit based on sex and will not be aware of the harassment. It is because courts recognize that employers cannot possibly be responsible for every unofficial action taken by their employees in the workplace, that a negligence standard applies to hostile work environment claims. Pet. App. 22a-23a. For this same reason, an unfulfilled threat should be regarded as evidence of a hostile work environment and held to a negligence standard, rather

than as independently actionable conduct for which the employer may be held strictly liable.[16]

None of these justifications for a strict liability standard exist where a *quid pro quo* harassment claim is based on an unfulfilled retaliatory threat or other "non-company" act. In these circumstances, the employer will have no notice or any record of the action which gives rise to the employee's claim because no tangible effect on the employee's employment status is necessary to make out such a claim. Furthermore, the employer will not have, through its supervisory employee, acted in any official capacity toward the employee. Avoiding liability under a strict liability standard will literally require employers to monitor every interaction between supervisory and other employees. Imposing such burdens on employers would be contrary to public policy because employers would be discouraged from implementing reasonable policies to combat sexual harassment if those policies did not afford them protection from liability.

---

[16] Professor Verkerke recognized this notice distinction between *quid pro quo* harassment and, as he calls it, attempted *quid pro quo* harassment, when he wrote "[q]uid pro quo harassment thus involves unconcealed action -- an adverse employment decision -- about which the employer can learn even more easily than victims." Verkerke, 81 Va. L. Rev. at 367. On the other hand, attempted *quid pro quo* harassment does not involve an unconcealed action. Addressing such circumstances, Professor Verkerke wrote, "[i]f a supervisor fails to follow through on his threat of sexual blackmail ... the unwelcome sexual advance could presumably be the basis for a hostile environment claim." *Id.*, at n. 261.

B. Imposing A Strict Liability Standard For Threats Would Place An Impossible Burden On Employers While At The Same Time Encroaching On Employee Privacy

Generally, strict liability is applied when a person stands in a unique position to prevent a foreseeable harm to another. *See Restatement (2d) of Torts*, §§ 519 & 520; *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901 (1963)(discussing application of strict liability to product liability cases). However, as a practical matter, an employer is without the ability to prevent workplace *quid pro quo* sexual harassment in its entirety. Attempting to eradicate this problem would require invasive monitoring of the behavior of hundreds or even thousands of supervisory employees performing different functions in different locales, each of whom must be given some level of discretion to perform their jobs.[17] In this context, strict liability places an impossible burden on employers while at the same time encroaching on employee privacy.

This is not to say that employers are powerless to deter or reduce sexual harassment in the workplace or that an employer's inattention to or casual treatment of sexual harassment should not form the basis for liability. However, the adequacy of an employer's efforts in this regard should be judged by a standard of reasonableness, not by whether the employer has been successful in completely stamping out a deeply rooted societal malady. Under a negligence standard, an employer's culpability for threats can be assessed in the context of all relevant circumstances, including the severity of the threat, how the threat was perceived by the victim of it, and

---

[17] In some states, such monitoring of employees would expose employers to liability for invasion of privacy.

whether the employer had made it clear to employees that any such threats would not be tolerated and would be redressed by the employer. By contrast, the strict liability standard which the Seventh Circuit has applied to threats focuses only on whether a threat was made, not on what the employer has already done to combat harassment, what the employer could have done to prevent the particular instance of harassment, or how the employer attempted to remedy the harassment if it was brought to the employer's attention.

C. If Threats Only Are Actionable Under A Strict Liability Standard, The Number Of *Quid Pro Quo* Claims Will Increase Significantly

The Seventh Circuit's categorization of unfulfilled retaliatory threats as *quid pro quo* sexual harassment is also likely to greatly expand the number of sexual harassment claims brought under a *quid pro quo* theory and decrease the number of cases which may be resolved at the summary judgment stage. Whereas under the approach adopted by a majority of the circuits, a plaintiff must produce evidence of a tangible Job detriment in order to proceed on a *quid pro quo* claim, if mere threats are indeed actionable as *quid pro quo* harassment, a plaintiff need only allege that a supervisor's offensive conduct was linked to a job detriment or benefit.

Thus, many claims which were previously adjudicated under the negligence standard associated with a hostile work environment theory will be transformed into strict liability *quid pro quo* cases. As cautioned by Judge Manion, "because so many complaints of sexual harassment contain threatening comments, *quid pro quo* harassment and strict liability would become the typical case rather than the narrow exception it should be." Pet. App. 161a. Because these cases will often

depend upon resolution of the conflicting testimony of the plaintiff and the accused supervisor, they will be incapable of resolution at the summary judgment stage. The resulting increase in jury trials will further burden the already overtaxed federal judiciary and increase employers' Title VII-related litigation costs.

III. THE SEVENTH CIRCUIT'S EXPANSION OF THE *QUID PRO QUO* DOCTRINE TO INCLUDE SLOWIK'S IMPLIED THREATS IS CONTRARY TO THIS COURT'S STRICT LIABILITY DISCUSSION CONTAINED IN *MERITOR* AND THE APPLICATION OF COMMON-LAW AGENCY PRINCIPLES

This Court held in *Meritor* that employers are not automatically or strictly liable for sexual harassment by their supervisors. *Meritor*, 477 U.S. at 72. Rather, this Court stated that Congress intended for courts to be guided by agency principles in determining the proper standard of liability. *Id.*[18] Although announcing this holding in *Meritor*, the Court also cautioned that "such common-law principles may not be transferable in all their particulars to Title VII . . . . " *Id.*

Application of a strict liability standard to mere threats of retaliation has no support in the traditional agency principles set forth in the *Restatement (Second) of Agency*, which courts have routinely used as a guide to establishing liability. Rather, under agency principles, an employer may only be held liable

---

[18] This Court held that Congress' decision to define an "employer" for purposes of Title VII to include an "agent" of an employer "surely evinces an intent to place limits on the acts of employees for which employers under Title VII are to be held liable." *Id.*

for its own conduct that results in harm to an employee through the acts of a supervisor. In other words, an employer that authorizes or ratifies unlawful threats made by a supervisor, or that is negligent in addressing them once they are brought to the employer's attention, could be liable.

In this case, it is undisputed that Burlington neither authorized nor ratified Slowik's threats, nor was it negligent in addressing them since they were never even brought to Burlington's attention. Under common-law agency principles, therefore, Burlington cannot be liable for Slowik's threats.

A. Slowik's Implied Threats Were Outside The Scope Of His Employment

When Slowik allegedly requested, over the telephone, that Ellerth tell him what she was wearing and when he asked her if she was wearing shorter skirts yet, he was pursuing his own agenda and clearly acting outside the scope of his employment and Ellerth knew it. Under well-established agency principles, Burlington cannot be held strictly liable for that conduct.

Section 219(1) provides that an employer is liable for the torts of an employee committed while acting "within the scope of employment." *Restatement (2d) of Agency*, § 219(1). Section 228(1) in turn provides that conduct is within the scope of an employee's employment if and only if:

> (a) it is the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and;

(d) if the force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement (2d) of Agency, § 228(1).

Applying these criteria to threats in this case, it is clear that two of the three relevant and necessary factors do not even apply, *i.e.*, (a) supervisors are not employed to make threats of retaliation for failing to submit to sexual advances; and (c) a supervisor's threats are not actuated, even in part, by a purpose to serve his employer. As Judge Posner once remarked, "[i]t would be the rare case where . . . harassment . . . could be thought by the author of the harassment to help the employer's business." *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1422 (7th Cir. 1986). In fact, to the contrary, sexual harassment generally interferes with an employer's business.[19]

---

[19] Although employers have generally been held liable under Section 219(1) of the *Restatement* for *quid pro quo* sexual harassment, that liability is based on the principle that "[t]he supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee." *Kotcher*, 957 F.2d at 62 (emphasis added); *see also Steele*, 867 F.2d at 1316 (holding that employer liability is appropriate in *quid pro quo* cases because the supervisor "acts within the scope of his actual or apparent authority to `hire, fire, discipline or promote'") (citing *Henson*, 682 F.2d at 910). This reasoning is inapplicable to the instant case because Slowik never exercised whatever power he may have had to affect tangible aspects of Ellerth's employment and therefore never wielded such authority.

B. Ellerth Could Not Have Reasonably Believed That Slowik Had The Apparent Authority To Make The Implied Threats She Has Alleged

The apparent authority principles contained in Section 219(2)(d) of the *Restatement* cannot be used as a basis for strict liability in this case since Ellerth could not reasonably have believed that Burlington authorized Slowik to make the threats alleged in this case. In fact, Ellerth's admissions that she was aware of Burlington's sexual harassment policy and grievance procedure, coupled with her acknowledgment that had she complained about Slowik's threats to her immediate supervisor it would have been his duty to report the conduct to Burlington's attention, belie any such claim.

Section 219(2)(d) of the *Restatement* provides that an employer may be liable for the acts of an employee occurring outside of the scope of employment where "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or was aided in accomplishing the tort by the existence of the agency relation." *Restatement (2d) of Agency*, § 219(2)(d). "As the commentary to the Restatement suggests . . . this exception embraces a narrower concept that holds the employer liable only if the tort was 'accomplished by an instrumentality, or through conduct associated with the agency status.'" *Gary*, 59 F.3d at 1397 (quoting Restatement § 219 cmt. e). The commentary illustrates liability under the second clause of § 219(2)(d) with two narrow examples; a telegraph operator sending false telegraph messages, or a store manager cheating customers at the store. As the D.C. Circuit recognized, "[i]n such cases, '[l]iability is based upon the fact that the agent's position facilitates the consummation of the [tort], in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course

of the business confided to him.'" *Gary*, 59 F.3d at 1397 (quoting Restatement § 261 cmt. a, *see also* Restatement § 219 cmt. e (citing § 261 cmt. a)).

Thus, Burlington cannot be liable for Slowik's alleged threats under section 219(2)(d) because, to Ellerth, Slowik's conduct could hardly "seem regular on its face." Ellerth was fully aware, based on her admitted knowledge of Burlington's sexual harassment policy, that Slowik did not have the "authority" (whether apparent or delegated) to sexually harass her, and, in fact, knew that Burlington had alternative procedures in place to redress any harassment. *See also Smith v. Metropolitan School Dist. Perry Township.*, 128 F.3d 1014 (7th Cir. 1997) (§ 219 (2)(d) cannot be used as basis for holding school district liable for sexual harassment where it was clear harasser's conduct "could hardly seem regular on its face"); *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 262 (4th Cir. 1996) (employer not liable for supervisor's sexual harassment where plaintiff knew that she could complain to another corporate officer and therefore could not have reasonably believed that supervisor was acting on behalf of employer); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 109 (3d Cir. 1994) ("Our agency precedent requires the belief in the agent's apparent authority to be reasonable before the principal will be bound").[20]

---

[20] Moreover, as the court in *Gary* recognized, "[it] is a general principle of agency law that:

> [i]f a person has information which would lead a reasonable man to believe that the agent is violating the orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability."

(continued...)

IV. THE MAJORITY OF CIRCUIT COURTS AGREE THAT THE DOCTRINE OF *QUID PRO QUO* SEXUAL HARASSMENT DOES NOT APPLY TO UNFULFILLED THREATS

No Circuit, other than the Seventh Circuit in this case, has held an employer strictly liable for unfulfilled threats. Rather, a majority of circuits require a plaintiff to prove, as an element of a Title VII *quid pro quo* sexual harassment claim, that the harassment affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment.

A. The District Of Columbia Circuit Court, The Only Other Circuit Court To Directly Address This Issue, Has Held That A Tangible Job Detriment Is Required In *Quid Pro Quo* Cases

The only Circuit other than the Seventh Circuit to directly address the scope of *quid pro quo* claims is the Court of Appeals for the District of Columbia. In *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 569 (1995), the District of Columbia Circuit rejected an employee's *quid pro quo* sexual harassment claim where the employee had produced no evidence that her supervisor's sexual advances had any tangible effects on her employment. There, in a much more aggravated factual situation than presented here, the plaintiff's supervisor first promised that he would "make her job easier" if she would have sex with him and then threatened

---

[20](...continued)
Gary, 59 F.3d at 1398, citing Restatement § 166 cmt. a. Based on this principle, Ellerth could not have believed (nor has she ever claimed she believed) that Slowik was acting within his authority when he allegedly made the threats at issue in this case.

various reprisals, including termination, if she refused to have sex with him. *Id.* at 1393-94.

The D.C. Circuit nonetheless held that the plaintiff could not state a *quid pro quo* claim against her employer because she had adduced no evidence that the supervisor's threats were ever carried out. *Id.* at 1396. The court declared, "it takes more than saber-rattling alone to impose *quid pro quo* liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." *Id.* at 1396. The absence of such consequences in that case precluded the plaintiff from proceeding under a *quid pro quo* theory. The same absence of such consequences in this case precludes Ellerth from proceeding under a *quid pro quo* theory.

B. The First, Second, Fourth, Fifth, Sixth, Eighth And Tenth Circuits Have All Defined *Quid Pro Quo* Harassment As Requiring A Tangible Job Detriment Or Submission

The First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have all defined *quid pro quo* harassment consistently with the holding in *Gary*. Each of these circuits has stated that an essential element of a *quid pro quo* claim is that the harassment affect tangible aspects of the plaintiff's employment. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) (an essential element of *quid pro quo* harassment is that the employee "was subject to unwelcome sexual advances by a supervisor or teacher and . . . that his or her reaction to these advances affected tangible aspects of his or her compensation, terms, conditions or privileges of employment . . . ."); *accord Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990)(quoting *Lipsett*); *Spencer v.*

General Electric Co., 894 F.2d 651, 658 (4th Cir. 1990)(essential element of a *quid pro quo* sexual harassment claim is that "[t]he employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment"); *Ellert v. University of Texas, at Dallas*, 52 F.3d 543, 545 (5th Cir. 1995)(*quid pro quo* harassment claim requires proof that the employee's "reaction to the harassment affected tangible aspects of the terms and conditions of her employment"); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 187 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992)(requiring in a *quid pro quo* claim that the plaintiff's reaction to the harassment have affected tangible aspects of employment and permitting employer to rebut plaintiff's allegations by showing that the harassment had no tangible affect on terms and conditions of employment); *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995)(employee must prove that "submission to the unwelcome advances was an express or implied condition for receiving job benefits or her refusal to submit resulted in a tangible job detriment"); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993)(claim for *quid pro quo* harassment may lie only "[i]f the plaintiff can show that she suffered an economic injury from her supervisor's actions"); *accord Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987)("[t]he gravamen of a *quid pro quo* sexual harassment claim is that tangible job benefits are conditioned on an employee's submission to conduct of a sexual nature and that adverse job consequences result from the employee's refusal to submit to the conduct"); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 (11th Cir. 1987)(element of *quid pro quo* harassment claim is "that the employee's reaction to the harassment complained of affected tangible aspects of the employee's compensation, or terms, conditions or privileges of employment").

The Second Circuit has likewise consistently defined *quid pro quo* sexual harassment as requiring proof that the plaintiff was denied an economic benefit due to the rejection of a supervisor's sexual advance. *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 142 (2d Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994); *Kotcher*, 957 F.2d at 62; *Carrero v. New York City Housing Authority*, 890 F.2d 569, 579 (2d Cir. 1989). Although the Second Circuit, in *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994), held that loss of an economic benefit is unnecessary where the employee has submitted to the supervisor's sexual demands, the court specifically stated that this holding was consistent with *Kotcher* and *Carrero*. 14 F.3d at 778-79. Thus, it appears that the Second Circuit also requires either submission to a supervisor's sexual advances or a tangible job detriment in order to make out a *quid pro quo* claim.

C. Only The Third And Ninth Circuits Have Defined *Quid Pro Quo* Harassment As Requiring Only A Threat, And They Have Done So In Cases Where The Definition Was Not Relevant To The Holding Of The Cases

Only the Third and Ninth Circuits have defined *quid pro quo* harassment as requiring only a threat of adverse job consequences. Both circuits have done so in cases that did not involve solely threats, thus the definitions they adopted were not determinative to the holdings in those cases. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1997) (*quid pro quo* evidence was sufficient where supervisor blocked plaintiff's transfer); *Heyne v. Caruso*, 69 F.3d 1475, 1478 (9th Cir. 1995); *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994). *Robinson*, *Heyne* and *Nichols* all involved circumstances where the employee either submitted to the

supervisor's sexual advances or was subjected to adverse employment consequences. *Robinson*, 120 F.3d at 1298-1299; *Heyne*, 69 F.3d at 1478-79; *Nichols*, 42 F.3d at 513. The Seventh Circuit is therefore the first circuit court to actually recognize a *quid pro quo* harassment claim where the plaintiff neither submitted to the advances nor suffered tangible effects on the terms and conditions of employment.

CONCLUSION

The judgment of the court of appeals on the issue before this Court should be reversed.

Respectfully submitted,

ROBERT A. WICKER
Vice President and
General Counsel
BURLINGTON INDUSTRIES, INC.
3330 West Friendly Avenue
Greensboro, NC 27420

JAMES J. CASEY
Counsel of Record
MARY MARGARET MOORE
ROSS & HARDIES
150 N. Michigan Avenue
Suite 2500
Chicago, IL 60601
(312) 558-1000

Counsel for Petitioner
Burlington Industries, Inc.